SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 972

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

GOOCH MILLING AND ELEVATOR COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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a [Caption omitted.]
1 Before United States Board of Tax Appeals

Docket No. 103993

GOOCH MILLING & ELEVATOR COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For Taxpayer: Ellsworth L. Fulk, F. W. McReynolds, J. Lee Rankin. For Comm'r: E. M. Woolf, Esq.; Angus R. Shannon, Esq.; J. M. Morawski, Esq.

Docket entries

1940

Aug. 1—Petition received and filed. Taxpayer notified. (Fee paid.)
Aug. 1—Copy of petition served on General Counsel.
Sept. 3—Answer filed by General Counsel.
Sept. 3—Request for hearing in Omaha, Nebraska, filed by General Counsel.
Sept. 9—Notice issued placing proceeding on Omaha calendar. Answer and request served.

1941

Mar. 17—Hearing set May 26, 1911, in Omaha, Nebraska.
Mar. 29—Notice of appearance of F. W. McReynolds, as counsel for taxpayer filed.
Mar. 29—Motion to transfer the hearing from Omaha, Nebraska, to Washington, D. C., filed by taxpayer.
Apr. 2—Hearing set April 23, 1941, on petitioner's motion.
Apr. 2—Copy of motion and notice of hearing served on General Counsel.
Apr. 17—Notice to send all notices to F. W. McReynolds filed by Ellsworth L. Fulk.
Apr. 23—Hearing had before Mr. Arundell on request of petitioner for Washington, D. C., calendar. (Set on Omaha, Nebraska, calendar.) Argued and denied.
Apr. 23—Motion for transfer to Washington, D. C., calendar filed by taxpayer. Denied.
Apr. 20—Motion for leave to file amended petition, amended petition lodged, filed by taxpayer.
May 3—Hearing set May 14, 1941, on petitioner's motion.
2 May 3—Copy of notice of hearing, motion and amended petition served on General Counsel.

May 14—Hearing had before Mr. Van Fossan on motion of petitioner to file an amended petition. Continued to Omaha, Nebraska, calendar of May 26, 1941.

May 14—Order of continuance to the Omaha, Nebraska, calendar of May 26, 1941, for hearing on motion at the same time proceeding is set for hearing on the merits entered.

May 26—Hearing had before Mr. Arnold on the merits. Submitted. Appearance of J. L. Rankin, Esq. Petitioner's brief due July 25, 1941. Respondent's brief August 25, 1941. Replies due Sept. 10, 1941. (Motion of petitioner to file amended petition. C.A.V.)

June 11—Transcript of hearing 5/26/41 filed.

July 9—Brief filed by taxpayer. 7/9/41 copy served on General Counsel.

Aug. 25—Brief filed by General Counsel.

Sept. 9—Reply brief filed by taxpayer. 9/9/41 copy served on General Counsel.

Dec. 17—Memorandum findings of fact and opinion rendered. Arnold, #12. Decision will be entered for the respondent. 12/18/41 copy served.

Dec. 18—Decision entered. Arnold, Div. 12.

1942

Mar. 17—Supersedeas bond in the amount of $14,000.00 approved and ordered filed.

Mar. 17—Petition for review by U. S. Circuit Court of Appeals, 8th Circuit, with assignments of error filed by taxpayer.

Mar. 18—Proof of service filed by taxpayer.

May 9—Motion for extension of 60 days from 5/16/42 to prepare and transmit the record filed by taxpayer.

May 9—Order enlarging time to July 15, 1942, to prepare and deliver the record entered.

June 17—Statement of evidence lodged.

June 17—Motion for hearing July 1, 1942, on statement of evidence filed by taxpayer, with proof of service of motion and statement of evidence thereon.

July 1—Hearing had before Mr. Murdock on approval of
3 statement of evidence Agreed statement filed at hearing. Referred to Mr. Arnold for approval.

July 1—Agreed statement of evidence approved and ordered filed.

July 8—Praecipe for record filed by taxpayer, with proof of service thereon.

Before United States Board of Tax Appeals

[File endorsement omitted.]

[Title omitted.]

Petition

Filed Aug. 1, 1940

Except as indicated below, the Petition filed August 1st, 1940 was identical in form and context with the "Amended Petition" hereinafter set out and which Amended Petition was lodged with the United States Board of Tax Appeals April 30, 1941. The exceptions are that Paragraph 3½; Paragraph 4-a½, and Paragraph 4½ of the Amended Petition (hereinafter set out) were not contained in the petition filed August 1, 1940; and that the prayer, signature and verification of the petition filed August 1, 1940, were not the same but in the original Petition were as follows:

"5. Wherefore, the petitioner prays that this Board may hear the proceedings and set aside the deficiency asserted by the Commissioner.

ELLSWORTH L. FULK,
Agent for Petitioner,
1223 Sharp Building, Lincoln, Nebraska."

[*Duly sworn to by F. E. Roth; jurat omitted in printing.*]

4 [File endorsement omitted.]

[Title omitted.]

Before United States Board of Tax Appeals

Answer

Filed Sept. 3, 1940

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petitioner filed August 1, 1940 in the above-entitled proceeding admits and denies as follows:

1. Admits the allegations contained in paragraph 1, of the petition.

2. Admits that the taxes in controversy are income and excess-profits taxes in the amounts of $4,731.69 and $1,931.73, respectively, for the taxable year ended June 30, 1936. Denies the remaining allegations contained in paragraph 2 of the petition.

3. Denies that the Commission erred as alleged in paragraph 3 of the petition.

4 (a) and (b). Denies the allegations of facts contained in sub-paragraphs (a) and (b) of paragraph 4 of the petition.

Denies generally and specifically each and every allegation set forth in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the appeal be denied.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

of Counsel:
R. P. HERTZOG,
Division Counsel.
R. H. TRANSUE,
Special Attorney,
Bureau of Internal Revenue.

[File endorsement omitted.]
[Title omitted.]

Before United States Board of Tax Appeals

Amended petition

(*Lodged Apr. 30, 1941*)

The above-named petitioner hereby petitions for a determination of its income and excess-profits tax liability for the year ended June 30, 1936, and as a basis for such determination alleges as follows:

1. The petitioner is a corporation, incorporated in the State of Nebraska, with its principal office at 6th and South Streets, Lincoln, Nebraska. The petitioner's tax return for the year ended June 30, 1936, was filed with the Collector of Internal Revenue, Omaha, Nebraska, and disclosed no tax liability.

2. The Commissioner of Internal Revenue has deter-
6 mined the taxpayer's liability for income and excess-profits taxes for the year ended June 30, 1936, to be $14,951.85. The taxpayer has paid $8,288.43 of such tax, leaving a deficiency of $6,663.42. A copy of the Commissioner's notice of deficiency is attached hereto and marked Exhibit A. The taxpayer alleges that there is no deficiency but that it is entitled to a refund of $8,288.43. The net income and the tax liability of the taxpayer.

as determined by the Commissioner and as admitted by the taxpayer, are shown on exhibit B attached.

3. In determining the deficiency of $6,663.42, the Commissioner has erroneously reduced the petitioner's inventories at June 30, 1935, in the aggregate amount of $238,277.63, which amount was added to the petitioner's income for the year ended June 30, 1936, but was not deducted from the petitioner's income in determining its tax liability for the year ended June 30, 1935.

3½. The Commissioner used an inventory July 1, 1935, of $123,424.25 in computing petitioner's taxable net income for the year ended June 30, 1936. If the same inventory is used June 30, 1935, in computing the taxable net income for the year ended June 30, 1935, and no other adjustments are made, there would be a net loss for the year and an overassessment of $11,038.73.

4. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) After the death of the taxpayer's president on June 11, 1938, it was revealed that the taxpayer's inventories at June 30, 1935, which [fol. 13] were used as a credit to the cost of goods sold in determining the petitioner's taxable income for the year ended June 30, 1935, and as a charge to the cost of goods sold in determining the petitioner's taxable income for the year ended June 30, 1936, were very likely overstated. The extent of such overstatement cannot be determined as the inventory quantities are not available. However, the Commissioner has estimated the over statement to be as follows:

Wheat	$203,078.54
Flour	25,828.71
Accrued profit on wheat options	1,173.30
	230,080.55

7 The petitioner contends that the above adjustments made by the Commissioner are incorrect because they are based on estimated inventory quantities which are incorrect. The petitioner also contends that the commissioner cannot use an opening inventory as at July 1, 1935, which is different from the closing inventory as at June 30, 1935.

(a½) Petitioner has paid $11,038.73 tax for the year ended June 30, 1935, based upon a taxable net income of $72,206.57. The closing inventory June 30, 1935, used in computing the gross profits which resulted in a taxable net income of $72,206.57 was $361,701.88. The Commissioner used an inventory of $123,424.58 as of July 1, 1935, in computing the taxable net income of $93,828.83 for the year ended June 30, 1936, which resulted in the proposed deficiency of $6,663.42. Had the Commissioner used the $123,424.58 as the closing inventory June 30, 1935,

instead of the inventory of $361,701.88, there would have been a net loss for the year ended June 30, 1935, of $166,070.73 and an overassessment of $11,038.73, the entire amount of the tax paid.

(b) The flour inventory as at June 30, 1935, which was used as a credit to the cost of goods sold in determining the petitioner's taxable income for the year ended June 30, 1935, and as a charge to the cost of goods sold in determining the petitioner's taxable income for the year ended June 30, 1936, was reduced in the amount of $8,197.08, which represents the processing tax which was imposed but not paid. The petitioner admits that the tax was not paid, but it contends that the Commissioner cannot use an opening inventory as at July 1, 1935, which is different from the closing inventory at June 30, 1935.

The petitioner's inventories at June 30, 1935, as used in its tax return for the year ended June 30, 1935, and as used by the Commissioner in determining the petitioner's taxable income for the year ended June 30, 1936, are shown below:

8 INVENTORIES 6-30-35 USED BY COMMISSIONER

	Closing inventories year ended 6-30-35	Reductions	Opening inventories year ended 6-30-36
Wheat	$270,945.57	$203,078.54	$67,867.03
Flour	61,683.62	34,025.79	27,657.83
Corn	1,975.98		1,975.98
Package goods	7,285.85		7,285.85
Sacks and twine	11,451.98		11,451.98
Accrued profit on wheat options	1,173.30	1,173.30	
Accrued profit on flour contracts	7,185.58		7,185.58
Total	361,701.88	238,277.63	123,424.25

4½. Wherefore the Petitioner prays that this appeal may be considered and the deficiency claimed by Respondent set aside.

5. The petitioner further prays that it may have alternative relief as follows: If the Board finds that the opening inventory used by the Commissioner for 1936 is correct, then, and in that event, the Board shall apply the same to the year ending June 30, 1935, as closing inventory, showing that petitioner has been subjected to an overassessment for that year; and further, that the Board direct that said overassessment be applied by the Respondent as an offset, or recoupment, against any deficiency found for the year ending June 30, 1936.

(S) F. W. McREYNOLDS,
(S) ELLSWORTH L. FULK,
Attorney and agent for Petitioner,
719-15 St. NW, Washington, D. C.

[*Duly sworn to by J. M. Hammond; jurat omitted in printing.*]

9 *Exhibit A (1) to amended petition*

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
Omaha, Nebraska, May 7, 1940.

OMAHA DIVISION
676 Saunders-Kennedy Bldg.,
GOOCH MILLING & ELEVATOR COMPANY,
Sixth & South Streets, Lincoln, Nebraska.

SIRS: You are advised that the determination of your income tax liability for the taxable year June 30, 1936, discloses a deficiency of $4,731.69 and that the determination of your excess-profits tax liability for the year(s) mentioned discloses a deficiency of $1,931.73, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Omaha, Nebraska, for the attention of LLN:90D. The signing and filing of this form will expedite the close of your return(s) by permitting an early assessment of the deficiencies, and will prevent the accumulation of inter-
10 est, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, GUY T. HELVERING,
Commissioner,
By (Signed) T. P. SMITH,
Internal Revenue Agent in Charge.

Enclosures:
Statement.
Form of waiver.

Exhibit A (2) to amended petition

STATEMENT

GOOCH MILLING & ELEVATOR COMPANY, SIXTH & SOUTH STREETS LINCOLN, NEBRASKA.

Tax Liability for the Taxable Year Ended June 30, 1936

	Liability	Assessed	Deficiency
Income tax	$12,901.46	$8,169.77	$4,731.69
Excess-profits	2,050.39	118.66	1,931.73

In making this determination of your income and excess-profits tax liability, careful consideration has been given to the internal revenue agents reports dated September 10, 1937, November 1, 1937, July 19, 1938, and June 3, 1939, to your protest dated September 25, 1937, and to the statements made at the conference held at the Lincoln, Nebraska, office of the Internal Revenue Agent in Charge, Omaha, Nebraska, on October 8, 1937.

ADJUSTMENTS TO NET INCOME

	Net loss as disclosed by return		
	Unallowable deductions and additional income		$ 5,533.47
	(a) Advertising, disallowed	$ 2,708.91	
	(b) Taxes, disallowed	259.72	
	(c) Processing tax accrual, disallowed	124,127.59	
	(d) Processing tax on sacks	820.73	
	(e) Contributions, disallowed	766.98	
	(f) Inventory adjustment, June 30, 1935	237,104.33	
			365,788.26
	Total		360,254.79
11	Nontaxable income and additional deductions:		
	(g) Attorney's fees allowed	10,000.00	
	(h) Inventory adjustment, June 30, 1936	216,098.33	
	(i) Processing Tax on flour in transit, 1/6/36	3,218.54	
	(j) Processing tax withheld by court, allowed	1,639.60	
	(k) Commodity loss allowed	34,508.87	
	(l) Bonus allowed	200.00	
	(m) Refund of processing tax on sacks	563.05	
	(n) Liquidating dividend eliminated	134.40	
	(o) Miscellaneous income adjustment	.17	
			266,425.96
	Net Income Adjusted		$93,828.83

Exhibit B to amended petition

	As shown by Commissioner's report	Admitted by taxpayer	Difference
Net income	$93,828.83	$144,448.80	$238,277.63
Income subject to excess profits tax:			
Declared value	400,000.00	400,000.00	
Net income for year ended June 30, 1935	22,568.35	22,568.35	
Adjusted value	422,568.35	422,568.35	
12½% of adjusted value	52,821.04	52,821.04	
Income subject to tax	41,007.79		41,007.79
Income tax at 13¾%	12,901.46		12,901.46
Excess-profits tax at 5%	2,050.39		2,050.39
	14,951.85		14,951.85
Previously paid	8,288.43	8,288.43	
Deficiency	6,663.42	8,288.43	14,951.85

12 [File endorsement omitted.]

Before United States Board of Tax Appeals

[Title omitted.]

Motion for leave to file amended petition.

Filed April 30, 1941

Comes now Petitioner, by it's attorney, F. W. McReynolds, and moves this Honorable Board for leave to file an amended Appeal Petition, hereto attached.

The grounds for this motion are that, since the original petition was filed, certain court and other decisions have been rendered which make it necessary to include additional facts therein, and to ask for alternative relief.

Respectfully submitted,

GOOCH MILLING & ELEVATOR COMPANY,
Petitioner.

By F. W. MCREYNOLDS,
Attorney.

[Title endorsement omitted.]

Before United States Board of Tax Appeals

GOOCH MILLING AND ELEVATOR COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 103993

J. Lee Rankin, *Esq.*, for the petitioner.
Angus R. Shannon, Jr., *Esq.*, for the respondent.

Memorandum findings of fact and opinion

Dec. 17, 1941

ARNOLD: This proceeding involves an income tax de-
13 ficiency of $4,731.69 and an excess-profits tax deficiency of $1,931.73 for the fiscal year ended June 30, 1936. Petitioner alleges that respondent

erroneously reduced the petitioner's inventories at June 30, 1935 in the aggregate amount of $238,277.63, which amount was added to the petitioner's income for the year ended June 30, 1936, but was not deducted from the petitioner's income in determining its tax liability for the year ended June 30, 1935.

Petitioner alleges that it is entitled to a refund of $8,288.43.

On April 30, 1941 petitioner filed a motion with the Board requesting leave to file an amended petition and to seek alternative relief. The amended petition was "lodged" with the Board and by consent of counsel the motion for leave to amend was taken under advisement pending consideration of the case on its merits. Respondent objected to the filing of the amended petition upon the ground that the Board is without jurisdiction to consider the matters therein contained, which relate to petitioner's tax liability for the fiscal year 1935, a year not before the Board.

Findings of fact

Petitioner is a Nebraska corporation with its principal office in Omaha. Its income tax returns were filed with the collector of internal revenue at Omaha, Nebraska.

On its income tax return for the fiscal year 1936 petitioner reported a net loss of $5,533.47. As a result of various adjustments respondent determined that petitioner's net income for 1936 was $93,828.83, upon which he computed a tax liability of

$14,951.85 of which $8,288.43 has been paid leaving the deficiencies hereinabove set forth.

The principal adjustment that respondent made related to petitioner's inventories. Petitioner's balance sheet for the taxable year shows an opening inventory of $361,701.88, and a closing inventory of $345,017.43. The deficiency letter shows that respondent reduced petitioner's opening inventory at July 1, 1935 by the following adjustment, "inventory adjustment, June 30, 1935, $237,104.33." The deficiency herein results primarily from this adjustment of petitioner's inventory.

Following the death of petitioner's president on June 11, 1938, an audit of petitioner's books revealed that all inventories
14 as far back as 1928 were erroneous. The reduced inventory was first computed by petitioner's accountants and was accepted by respondent as the basis for the present deficiencies.

Based upon corrected inventories the petitioner had overpaid its income taxes for all the years 1928 to 1934, inclusive, in a net sum in excess of $8,000. The revenue agent's report for the fiscal year 1935 shows an over-assessment for the fiscal year 1935 in the sum of $7,935.58, which amount is not subject to refund because barred by the statute of limitations.

Opinion

Petitioner, as we understand its position, does not deny its liability for the deficiencies asserted. It contends that it is entitled to use the defense of recoupment, i. e., as against the deficiency asserted, is entitled to set over and have credited against the same its over-payment of taxes in the fiscal year 1935. It cites and relies upon Bull v. United States, 295 U. S. 247, Stone v. White, 301 U. S. 532, Crossett Lumber Co. v. United States, 87 Fed. (2d) 930, Dixie Margarine Co. v. Commissioner, 115 Fed. (2d) 445, and Mills v. United States, 35 Fed. Supp. 738.

Despite petitioner's impressive argument on the equities in its behalf we are unable, for jurisdictional reasons, to grant the relief which petitioner desires. None of the above court cases hold that the Board has jurisdiction to consider the doctrine of equitable recoupment with respect to statutory deficiencies. The Board itself has held that it has no authority under the limited jurisdiction conferred upon it to apply the principles of recoupment. Red Wing Potteries, Inc., 43 B. T. A. 841, Helmuth Heyl, 34 B. T. A. 223; see also Lyeth v. Hoey, 112 Fed. (2d) 4, United States ex rel. Girard Trust Co. v. Helvering, 301 U. S. 540. Under our decisions we have no jurisdiction to consider the defense raised by this petitioner. The motion for leave to amend the petition is therefore denied.

Decision will be entered for the respondent.
[Entered: December 17, 1941.]
(Seal) Board of Tax Appeals, 1924.

15 [File endorsement omitted.]

Before United States Board of Tax Appeals

GOOCH MILLING AND ELEVATOR COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 103993

Decision

(Entered Dec. 18, 1941)

Pursuant to the determination of the Board, as set forth in its Memorandum Findings of fact and opinion entered December 17, 1941, it is ordered and decided: That there are deficiencies in income and excess-profits taxes for the fiscal year ended June 30, 1936, in the respective amounts of $4,731.69 and $1,931.73.

(S) WILLIAM ARNOLD.

Entered Dec. 18, 1941.
(Seal) Board of Tax Appeals, 1924.

Before United States Board of Tax Appeals

[Title omitted.]

Petition for Review and Assignment of Errors

Filed March 17, 1942

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

16 The Gooch Milling & Elevator Company, petitioner, respectfully petitions this Honorable Court of review the decision of the United States Board of Tax Appeals entered December 17, 1941, finding a deficiency in income and excess profit taxes of $6,663.42 due from petitioner for the fiscal year ending June 30, 1936.

JURISDICTION

Your petitioner is a corporation duly organized and existing under the laws of the State of Nebraska with its principal place of business at Lincoln, Nebraska. It filed its income tax returns for the fiscal years ending June 30, 1935, and June 30, 1936, with

the Collector of Internal Revenue for the State of Nebraska, at Omaha, Nebraska, located within the Jurisdiction of the Circuit Court of Appeals for the Eighth Judicial Circuit. The jurisdiction of the Court to review the decision of Board of Tax Appeals aforesaid is given by Sections 1140 to 1146 inclusive of the Internal Revenue Code of 1939.

NATURE OF CONTROVERSY

Petitioner's income tax return for the year ending June 30, 1935, was based upon a greatly inflated inventory as of that date, and the same inflated inventory was used as the opening inventory for the year beginning July 1, 1935, and ending June 30, 1936. These errors were not discovered until 1938 when its president and manager committed suicide. Immediate audits were then made of petitioner's books and records by both Internal Revenue and private auditors, who agreed as to results. These audits disclosed that back as far as 1928 income tax returns had been based on erroneous inventories, and during this period petitioner had overpaid its income taxes by more than $8,000. In 1935 the closing inventory of June 30, and the opening inventory of July 1, had been inflated in the sum of $237,104.33. Correction of this error resulted in showing that petitioner had overpaid its taxes for year ending June 30, 1935, by the sum of $7,935.58, and under-paid its taxes for the year ending June 30, 1936, by the sum of $6,663.42. On May 7, 1940, the Commissioner made formal demand for this deficiency.

17 On August 2, 1940, petitioner appealed to the Board of Tax Appeals from this demand, on the ground that different inventories could not be used for the ending of 1935 and beginning of 1936 tax years. On April 30, 1941, petitioner filed with the Board an amended petition in which it asked, if the 1936 deficiency were approved, that it be allowed equitable recoupment against the same, pro tanto, of the overpaid taxes for 1935. The Commissioner objected to this amended petition on the ground that the Board had not power to grant the relief sought. The Board withheld decision of the objection until the case was heard on the merits. At the trial proof was given of the facts as to the June 30–July 1, 1935 inventories, and the overpayment of income taxes for 1935 and prior years, and equitable recoupment again set up as a defense against the 1936 deficiency.

On December 17, 1941, the Board of Tax Appeals handed down its finding of facts and opinion. It held that it had "no jurisdiction to consider the defense raised" and refused to allow the appeal petition to be amended as hereinbefore set forth.

Assignment of errors

The United States Board of Tax Appeals erred as follows:

1. In refusing to allow the appeal petition to be amended as prayed.

2. In holding that it had no jurisdiction of the defense of equitable recoupment in this case.

3. In denying petitioner the relief of equitable recoupment, pro tanto, of the 1935 income tax overpayment against the deficiency demanded for 1936.

Wherefore petitioner prays that this Honorable Court may review the decision of the United States Board of Tax Appeals and reverse and set aside the same and direct said Board to allow the defense of equitable recoupment of the 1935 tax overpayment, pro tanto, against the tax deficiency for 1936; and for such further orders and directions as shall by this Court be deemed meet and proper, in accordance with law.

(S) F. W. McREYNOLDS,
F. W. McReynolds,
Union Trust Building, Washington, D. C.,
Attorney for Petitioner.

18 [*Duly sworn to by F. W. McReynolds; jurat omitted in printing.*]

To: COMMISSIONER OF INTERNAL REVENUE, *Washington, D. C.:*

You are hereby notified that on the 13th day of March, 1942, a petition for review by the United States Circuit Court of Appeals for the Eighth Circuit, of the decision of the United States Board of Tax Appeals heretofore rendered in the above entitled cause, was filed with the Clerk of said Board. A copy of the petition as filed is attached hereto and served upon you.

Dated: March 13, 1942.

(S) F. W. McREYNOLDS,
F. W. McReynolds,
Union Trust Building, Washington, D. C.

Service of the foregoing notice of filing and copy of the petition for review is hereby, acknowledged this 18th day of March, 1942.

(S) J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

United States Board of Tax Appeals, March 18, 1942.

19 Before United States Board of Tax Appeals

[File endorsement omitted.]

[Title omitted.]

Statement of evidence

(Filed at Hearing July 1, 1942)

The above-entitled cause came on for hearing at Omaha, Nebraska, before the Honorable William W. Arnold, Member of the United States Board of Tax Appeals, on the 26th day of May, 1941, petitioner being represented by J. Leo Rankin, Esq., and respondent by Angus R. Shannon, Jr. Esq., whereupon the following proceedings were had.

Petitioner's Amended Petition was considered and Respondent objected to it being filed. The Member ruled as follows:

"I will not pass on the right of the petitioner to file this amended petition at this time, but will admit the evidence to be submitted and then that matter can be thrashed out as to the right to file the amended petition, in the brief."

Whereupon Ellsworth L. Fulk, a witness called on behalf of petitioner, testified on direct examination as follows:

I am a certified public accountant and have audited the accounts and records of petitioner since 1933. I prepared it's income tax returns for years ending June 30, 1935 and 1936. Both returns show in full the inventories upon which they are based.

Whereupon petitioner's income and excess-profits tax returns for 1936 and 1935 were received in evidence as Petitioner's Exhibits 1 and 2, respectively.

Thereupon, there were received in evidence as Petitioner's Exhibit 3 copies of four reports of the Revenue Agent
20 on the examination of petitioner's income and excess-profits tax return for the year ended June 30, 1936.

There were three examinations and all three examinations are included in Exhibit 3. The last report, dated June 3, 1939, upon which the deficiency notice is based, differs from the others.

Thereupon petitioner's counsel stated that he was offering in evidence Revenue Agent's report dated June 3, 1939, on the examination of the petitioner's income and excess-profits tax return for the year ended June 30, 1935, for the sole purpose of showing the computation of the overassessment with regard to petitioner's tax for the year 1935, computed upon the basis of the reappraisal of the inventories of the petitioner for that period. Said report was received in evidence as Petitioner's Exhibit 4.

Said Exhibit 4 shows an overassessment of income tax for the year ending June 30, 1935 of $7,935.58. In preparing the return for 1935, I did not check the inventories as to quantities but only as to prices and extensions.

Something occurred in 1938 to cause a recheck of the petitioner's inventory over a period of time. On June 11, 1938, Mr. Gooch, president of petitioner, killed himself. An examination then made showed discrepancies in the inventories, and they were then worked back from an actual inventory made at that time. We started with the inventory taken in June 1938, and computed the inventories back each year to, I believe, 1929. The inventory adjustment made by the Treasury Department as of June 30, 1935, decreased the income for the year ended on that date and increased the income for the year ending June 30, 1936. The amount of the inventory adjustment was $238,000, if my memory is correct. If this adjustment had been applied to 1935, there would have been no income or no tax for that year.

Thereupon, two checks were received in evidence as Petitioner's Exhibits 5 and 6. Exhibit 5 is a check for $1,124.87, which paid the tax shown by the return filed for the year ended June 30, 1935. Exhibit 6 is a check for $10,854.98, which is a check for additional tax for the year 1935, plus interest. I computed the interest, and advised the petitioner to pay the tax.

Without this change in inventory, there would have been no tax due for 1936; with it, the deficiency claimed by respondent is due. Without this inventory change, there
21 would have been no taxable income for 1936. This change causes us to have less income for 1935 than we originally had, based on book inventories, and an overassessment for that year. If petitioner's amended petition is allowed, the same inventory will be used for the closing inventory for 1935 as is used by respondent as opening inventory for 1936 and this will make an overassessment for 1935. For the two years there would be a balance due petitioner of about $3,400.

Cross-examination of said ELLSWORTH L. FULK:

Sometime in 1939, we computed the inventory of the petitioner as of July 1, 1935, to be $123,434.45. There was an audit of petitioner's books made in June 1938 by Arthur Andersen & Company of Chicago. We didn't agree with it. We do not disagree with the audit in June 1938, but, as I recall, they worked back the inventories for 1 or 2 years, and then, when we came into the matter from the tax angle we worked them back and we did not

come out with the same inventory, but we never tried to reconcile it. I don't know what the difference was. The difference would probably be in computing the inventory through moisture. In other words, we take the actual inventory, and have the dry wheat and dirty wheat purchased, then our wheat ground is weighed after it is cleaned and the moisture added. So, to work the inventory back, we had to take the inventory of June 30, 1938, and take the wheat purchased and the wheat ground and work it back. We probably used a different moisture content.

I am familiar with the figure the respondent has used in his deficiency notice with regard to inventories. I do not disagree with that figure. It is the figure that we computed.

We computed the inventories and taxes back to 1928. In 1928 there was an overassessment of $5,736.76; in 1929, additional tax due of $10,744.07; in 1930, an overassessment of $6,011.40; in 1931, an overassessment of $4,160.24; in 1932, an overassessment of $2,260.95; in 1933, no tax paid, no tax due; in 1934, additional tax of $384.72. These were my original computations. The overassessment of $7,935.58 shown in Petitioner's Exhibit 4 is the difference between the amount of tax paid and the amount of the tax computed by the revenue agent on his last examination
22 of the books for the year ended June 30, 1935. This resulted from inventory adjustments and adjustment of processing tax on sacks.

Redirect examination of Mr. FULK:

Revision of inventories back to 1938, omitting 1935 and 1936, would result in a refund to petitioner of $6,970.14. Referring to Petitioner's Exhibit 4, in processing tax on sacks there is an item $563.05 one way and $1,112.00 the other way. The balance of the adjustments are the inventory matters I have been discussing.

Whereupon Mr. H. R. Ponder, being called as a witness for petitioner, testified on direct examination as follows:

I am a certified public accountant employed by Ellsworth L. Fulk. Under his employment I reaudited the inventories of petitioner in 1939, for years prior to 1938. There were no actual inventories available. We took the inventory at June 18, 1938, and added thereto the purchases made since the previous year end, June 30, 1937, and deducted therefrom the bushels of wheat ground and arrived at the bushels of wheat that should have been in the inventory at June 30, 1937; and for each year back to 1928 we used the same procedure to determine the bushels of wheat in the inventory at June 30. Due to the fact that the

wheat was purchased on the basis of dry, unclean wheat, whereas our records of the grind were on the basis of clean, moist wheat, it was necessary to make an adjustment for the gain in moisture. This was done from the records of the Lincoln Grain Exchange, which tests all wheat purchased by the company. Petitioner's own records showed moisture of wheat ground. The difference between these average moistures of wheat purchased and wheat ground we considered as a gain in milling, and eliminated that from the computation in order to arrive at the correct inventory at the end of each year. This was the best method I could devise. There was a reason for stopping with the check-back at the year 1928. At June 30, 1928, the books of the company showed the number of bushels of wheat on hand, as well as the value of the wheat on hand. It appeared from the records at that point that the inventory was probably correct prior to that period. It appeared that the amount of the inventory was correct, based on the current price of wheat at that time; and, also, our computations which we had made indicated that the inventory
23 shown by the books was very close to the computation which we had made. I believe there was a difference of about 14,000 bushels.

The agent in charge took the inventory figure that is shown in the letter fixing the deficiency for the year 1936 from the figures which I had computed, in the manner that I have described. It is my opinion that that is as accurate an approximation of the inventory of the company, as of July 1, 1935, as can be obtained. It is my opinion that the correct inventory of the company as of June 30, 1935, should be $123,424.25, and that of July 1, 1935, was the same.

No cross-examination.

The foregoing is all of the evidence adduced at the hearing before the United States Board of Tax Appeals material to this proceeding, and is hereby agreed to by the undersigned.

F. W. McREYNOLDS,
Attorney for Petitioner on Review.
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Attorney for the Respondent on Review.

Approved July 1, 1942.

(S) WILLIAM ARNOLD, *Member.*

Before United States Board of Tax Appeals

[File endorsement omitted.]

[Title omitted.]

Praecipe for record

Filed July 8, 1942

To the Clerk of United States Board of Tax Appeals:

24 You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, copies duly certified as correct of the following documents and records in the above mentioned cause in connection with the petition for review by said Circuit Court of Appeals for the Eighth Circuit heretofore filed by Petitioner on review:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board: (a) Petition with annexed copy of deficiency letter; (b) Amended Petition with Motion for leave to file; (c) Answer to original petition.
3. Statement of evidence.
4. Memorandum of Findings of fact and opinion by the Board.
5. Decision of the Board of December 18, 1941.
6. Petition for review with proof of service of notice of filing same and of a copy of said petition.
7. Order enlarging time for preparation of evidence and for transmission and delivery of the record.
8. This praecipe.

F. W. McREYNOLDS,
Attorney for Petitioner on Review.

Service of a copy of the above praecipe is hereby admitted this 23rd day of June 1942.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

25 [Clerk's certificate to foregoing transcript omitted in printing.]

Order of submission

November Term, 1942—Tuesday, November 10, 1942

This cause having been called for hearing in its regular order, argument was commenced by Mr. D. M. Kelleher, for petitioner, continued by Mr. Arthur A. Armstrong, Special Assistant to Attorney General, for respondent, and concluded by Mr. D. M. Kelleher for petitioner.

Thereupon, this cause was submitted to the Court on the transcript of the record from said Board of Tax Appeals and the briefs of counsel filed herein.

United States Circuit Court of Appeals, Eighth Circuit

No. 12372—January Term, A. D., 1943

GOOCH MILLING & ELEVATOR COMPANY, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition to Review Decision of the United States Board of Tax Appeals

January 29, 1943

Mr. D. M. Kelleher (Mr. F. W. McReynolds was on the brief) for Petitioner.

Mr. Arthur A. Armstrong, Special Assistant to the Attorney General (Mr. Samuel O. Clark, Jr., Assistant Attorney General, and Mr. Sewall Key, Mr. J. Louis Monarch, and Mr. Newton K. Fox, Special Assistants to the Attorney General, were on the brief) for Respondent.

Before GARDNER, WOODROUGH, and THOMAS, Circuit Judges.

GARDNER, Circuit Judge, delivered the opinion of the court.

This case is before us on petition to review a decision of the Board of Tax Appeals determining a deficiency in income and excess profit taxes of petitioner for the fiscal year ended June 30, 1936, in the respective amounts of $4,731.69 and $1,931.73.

Petitioner is a Nebraska Corporation operating flour mills. Following the death of its president on June 11, 1938, an audit

of the books showed that all inventories as far back as 1928 had been overstated. The reduced inventory for the fiscal year 1936 was first computed by petitioner's accountants and later accepted by the Commissioner as the basis for determining tax deficiencies. Petitioner's income tax return for the fiscal year 1936 reported a net loss, but the Commissioner reduced the opening inventory of July 1, 1935, that being the beginning of petitioner's fiscal year, by $237,104.33, and the deficiency resulted primarily from that adjustment. Based on these corrected inventories the petitioner had overpaid its income taxes for all the fiscal years 1928 to 1934 inclusive in excess of $8,000.00. A revenue agent's report for the fiscal year 1935 showed an overassessment of $7,935.58. The Commissioner, based, on this report, determined a deficiency of $4,731.69 in income taxes, and a deficiency of $1,931.73 on account of excess profit taxes for the fiscal year ended June 30, 1936. The taxpayer then filed its petition with the United States Board of Tax Appeals for a redetermination of the deficiencies. In its original petition to the Board the taxpayer alleged that the Commisisoner had determined its liability for income and excess profits for the year ended June 30, 1936, to be $14,951.85; that it had paid $8,288.43 of such tax, leaving a balance of $6,663.42; that there was in fact no deficiency, but that it was entitled to a refund of $8,288.43; that in determining the deficiency of $6,663.42 the Commissioner had erroneously reduced petitioner's inventories at June 30, 1935, in the aggregate amount of $237,104.33, which amount was added to petitioner's income for the year ended June 30, 1936, but was not deducted from its income in determining its tax liability for the year ended June 30, 1935. Thereafter the taxpayer filed a motion with the Board requesting leave to file an amended petition which contained allegations that the Commissioner used an inventory of $123,424.25 on July 1, 1935, in computing its taxable net income for the year ended June 30, 1936; that if the same inventory were used June 30, 1935, in computing the taxable net income for the year ended June 30, 1935, and no other adjustments were made there would be a net loss for the year and an overassessment of $11,038.73.

The amended petition sought alternative relief and asked to have the overassessment for the fiscal year 1935 applied as an offset or recoupment against the deficiencies found for the fiscal year 1936. The motion for leave to amend was taken under advisement pending consideration of the case on its merits. The Board entered findings of fact as follows:

"Petitioner is a Nebraska corporation with its principal office in Omaha. Its income tax returns were filed with the collector of internal revenue at Omaha, Nebraska.

"On its income tax return for the fiscal year 1936 petitioner reported a net loss of $5,533.47. As a result of various adjustments respondent determined that petitioner's net income for 1936 was $93,828.83, upon which he computed a tax liability of $14,951.85 of which $8,288.43 has been paid leaving the deficiencies hereinabove set forth.

"The principal adjustment that respondent made related to petitioner's inventories. Petitioner's balance sheet for the taxable year shows an opening inventory of $361,701.88, and a closing inventory of $345,017.43. The deficiency letter shows that respondent reduced petitioner's opening inventory at July 1, 1935, by the following adjustment, 'inventory adjustment, June 30, 1935, $237,104.33.' *The deficiency herein results primarily from this adjustment of petitioner's inventory.*

"Following the death of petitioner's president on June 11, 1938, an audit of petitioner's books revealed that all inventories as far back as 1928 were erroneous. The reduced inventory was first computed by petitioner's accountants and was accepted by respondent as the basis for the present deficiencies.

"Based upon corrected inventories the petitioner had overpaid its income taxes for all the years 1928 to 1934, inclusive, in a net sum in excess of $8,000. The revenue agent's report for the fiscal year 1935 shows an overassessment for the fiscal year 1935 in the sum of $7,935.58, which amount is not subject to refund because barred by the statute of limitations." [Italics supplied.]

The Board held that it was unable "for jurisdictional reasons to grant the relief which petitioner desires" and sustained the Commissioner's determination of deficiencies.

Petitioner seeks reversal on the grounds that the Board erred: (1) in refusing to allow the taxpayer to amend its petition; (2) in holding that it was without jurisdiction to apply the doctrine of equitable recoupment; (3) in denying the relief of equitable recoupment. While the Government in these proceedings has and is asserting a deficiency in the payment of income and excess profit taxes for the fiscal year 1936, it appears without dispute that it has collected and still holds in its hands money paid by the taxpayer in excess of the amount justly due for income and excess profit taxes for the fiscal year 1935. This money, though collected by mistake, is wrongfully withheld by the Government. The overpayment was discovered in connection with an investigation of a claimed deficiency in income and excess profit taxes for the fiscal year 1936. The Commissioner determined upon a correction or adjustment of the inventory of June 30, 1935, and then used it as the beginning inventory of the 1936 tax year. This inventory was reduced by $237,104.33 so as to make it $123,424.25. The taxpayer paid some $8,288.43 of the deficiency

determined for 1936 but there remained unpaid $6,663.42, the amount here involved. As to this claimed deficiency the taxpayer insists that it was entitled, under the doctrine of equitable recoupment, to offset the overpayment which it had made on the 1935 taxes. The Board in its findings states that "the deficiency herein resulted primarily from this adjustment of petitioner's inventory." In other words, without such readjustment there would be no deficiency. The adjustment of the beginning inventory for the 1936 taxable year automatically changed the 1935 closing inventory and established the error in the basis for computing the 1935 tax. Having collected and retained the taxes on the basis of the uncorrected inventory it is urged that the Government should not, in determining the question of the amount due for the 1936 taxes, insist on this adjustment and that to do so is violative of fundamental principles of abstract justice. Bull v. U. S., 295 U. S. 247; Crossett Lumber Co. v. U. S., 8th Cir. 87 F. 2d 930. In the first cited case as in the case at bar, the statute of limitations had run against a claim for overpayment of taxes and the question was whether such claim might not be offset against the Government's claim for taxes due. Addressing itself to the inquiry as to what remedy the taxpayer under such circumstances might have, the Court among other things said: "In a proceeding for collection of estate tax the United States through a palpable mistake took more than it was entitled to. Retention of the money was against morality and conscience. But claim for refund or credit was not presented or action instituted for restitution within the period fixed by the statute of limitations. If nothing further had occurred, congressional action would have been the sole avenue of redress.

"In July 1925, the Government brought a new proceeding arising out of the same transaction involved in the earlier proceeding. This time, however, its claims was for income tax. The taxpayer opposed payment in full, by demanding recoupment of the amount mistakenly collected as estate tax and wrongfully retained. Had the Government instituted an action at law, the defense would have been good. The United States, we have held, cannot, as against the claim of an innocent party, hold his money which has gone into the treasury by means of the fraud of their agent. United States v. State Bank, 96 U. S. 30, 24 L. Ed. 647. While here the money was taken through mistake without any element of fraud, the unjust detention is immoral and amounts in law to a fraud on the taxpayer's rights. What was said in the State Bank Case applies with equal force to this situation. 'An action will lie wherever the defendant has received money which is the property of the plaintiff and which the defendant

is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial * * * * * * If the claim for income tax deficiency had been the subject of a suit, any counterdemand for recoupment of the overpayment of estate tax could have been asserted by way of defense and credit obtained, notwithstanding the statute of limitations had barred an independent suit against the Government therefor. This is because recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely."

In Crosset Lumber Co. v. U. S., supra, speaking of the doctrine of recoupment, Judge Thomas speaking for this court among other things said: "The basis of the doctrine is that principle of natural justice which denounces a claim as unjust, immoral, and fraudulent when the claimant is at the same time wrongfully withholding money which in equity belongs to the other party. An action to recover taxes is in the nature of an action for money had and received. Although in form it is an action at law, it is governed by equitable principles (citing cases). In such an action a plaintiff cannot recover unless he can show that in equity and in good conscience he is entitled, as against the defendant, to the money. * * * In the case at bar one act, the erroneous valuation of the inventory of November 30, 1926, set in motion a course of events resulting in the erroneous refund to the taxpayer on one hand, and an overpayment in his favor on the other. Had the Government within the time limited brought an action to recover the refund made erroneously by the inventory, the taxpayer could have set up by way of defense its overpayment of income tax of the following year, induced by the same erroneous inventory. There is a direct connection in this case between income taxes paid in successive years based upon a single erroneous inventory as there was between the estate tax erroneously determined and income tax correctly determined on the same item in Bull v. United States, supra. That being the situation, it is immaterial that the parties are reversed and the taxpayer is bringing the suit."

In the instant case the taxpayer is asserting the right to recoup a claim for overpayment of taxes, but the principle applied in the Crossett Lumber Co. case is applicable here. Here, as in that case, there was a correction of an inventory. The inventory serves a double purpose. If fixes stock on hand at the end of one fiscal year and at the same time determines the same fact for the beginning of the ensuing year. The elimination of $237,-

104.33 from the inventory of June 30, 1935, automatically brought about a deficiency in the income tax for the fiscal year 1936. Whereas, if the taxpayer were permitted to use the original inventory there would be no deficiency for the fiscal year 1936. The same fact that establishes a deficiency for the fiscal year 1936 establishes an overpayment for the fiscal year 1935, and discloses that the Government has in its hands funds of the taxpayer which it would not have had were it not for the overstatement in the inventory. In this situation a manifest wrong results if the administrative tribunal or the court is powerless to prevent an unjust enrichment of one of the parties before it. Recoupment is purely defensive and is equitable in its nature. It reduces the claim affirmatively urged so far as in reason and conscience it ought. Stone v. White, 300 U. S. 530. Williams v. Neeley, 8th Cir. 134 F. 1. That the facts and circumstances here disclosed are such as to give rise to the right of recoupment is not seriously questioned. But it is urged that the Board of Tax Appeals is without authority to recognize this doctrine. The Board was created by the 1924 Congressional Act for "great remedial purposes." Helvering v. Taylor, 293 U. S. 507. The 1926 Act amended the 1924 Act by making provision for direct appeal from the Board to the Circuit Courts of Appeals, thus eliminating retrial in the District Court required under the 1924 Act. While the Board is not a court it has been called by the Board itself "a new creature with a special place in the Governmental system of settling disputes." Union Metal Mfg. Co., 4 B. T. A. 287. It has also been referred to as an "independent, Board of experts to decide impartially between the Government and the taxpayer." Avery v. Commissioner, 5th Cir., 22 F. 2d 6. The purpose of Congress in establishing the Board was to bestow at least quasi judicial functions, and to create for the trial of tax cases a body similar to the federal district court and the Court of Claims. Blair v. Osterlein Machine Company, 275 U. S. 220; Williamsport Wire Rope Co. v. U. S., 277 U. S. 551; Garden City Feeder Co. v. Commissioner, 75 F. 2d 804. The Board exercises functions similar to those exercised by a federal district trial court without a jury, Commissioner v. Liberty Bank and Trust Co., 6th Cir., 59 F. 2d 320. It has authority to redetermine deficiencies of income, estate and gift taxes asserted by the Commissioner. While it has no general equitable jurisdiction it has "the power to do full justice to the parties while they are still before it." Helvering v. Edison Securities Corp., 4th Cir., 78 F. 2d 85. In the last cited case the court among other things said: "Even after a full trial below an appellate court has the power to remand a case for further proceedings if it has

been tried on a wrong theory. Underwood v. Commissioner (CCA) 56 F. 2d 67 and 73; and it cannot be doubted in view of the purpose for which the Board was established and of the statutes governing its procedure, that it has equal power to do full justice to the parties while they are still before it." It has been held that an administrative tribunal is not deprived of the power to recognize the right of recoupment, because, as above noted, it has appellate powers, judicial in nature. Blair v. Osterlein Co., supra; Garden Feeder Co. v. Commissioner, supra; Bishoff v. Commissioner, 3rd Cir., 27 F. 2d 91; Cook v. U. S., 5th Cir., 198 F. 2d 804; Houston Street Corp. v. Commissioner, 5th Cir., 84 F. 2d 821.

In Blair v. Osterlein the Supreme Court, in speaking of the power of the Board, said "an examination of the sections creating the Board and investing it with power can leave no doubt that they were intended to confer upon it appellate powers which are judicial in character." On appeal from a decision of the Board of Tax Appeals this court may affirm, modify, or reverse the decision of the Board with or without remanding the case for rehearing, as justice may require. Hormel v. Helvering, 312 U. S. 552.

It is, however, the contention of respondent that the power to recognize the doctrine of recoupment as it is presented in this case is lacking because of statutory provisions, and Sec. 272 (g) of the Revenue Act of 1934 is relied upon. This provision reads as follows:

"The Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid."

In Dixie Margarine Company v. Commissioner, 6th Cir., 115 F. 2d. 445, the Court upheld the power of the Board to allow a recoupment based on an overpayment of tax for a prior year, although right to sue to recover same was barred by the statute of limitations. In the course of the opinion it is said "in the present case the claim for refund and the deficiency assessment had a common origin, namely, the erroneous application of the Oleomargarine Act to petitioner's product, and petitioner's claim is therefore available in recoupment.

"The Board had no occasion to consider whether the statute of limitation affected the availability of petitioner's claim in recoupment. We think it did not." The Board having failed to permit recoupment, its decision was reversed and the case

remanded for further proceedings in accord with the views expressed by the Circuit Court of Appeals.

Respondent quotes that part of the above statute which contains the limitation on the power of the Board, but we think it important to observe that the statute specifically provides that the Board "in redetermining a deficiency in respect to any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly to redetermine the amount of such deficiency." It should be considered as a whole and, if possible, all its provisions given effect. Jones v. York County, 8th Cir., 47 F. 2d 837. Unlimited power is vested in the Board to investigate and consider the facts with relation to the taxes of other taxable years in determining deficiencies of any particular year. The limitation is to the effect that the Board shall not "determine" that the tax for any other taxable year has been overpaid or underpaid. Whatever facts with relation to the taxes of other taxable years may be necessary in order to determine the amount of the deficiency may be considered.

The existence of a deficiency for the year 1936 was determined here and could only be determined by considering the tax for 1935. The two years are so tied together, that the deficiency for 1936 depends upon the corrected inventory for June 30, 1935. That inventory, if adopted, automatically reduces the amount of taxes assessable for 1935, and its appears as an incident to this investigation of the taxes for 1936, that the amount collected for 1935 exceeded the resulting deficiency claimed for 1936. The single act of reducing the inventory gave rise to an overpayment for one year and a deficiency in the other. Why should the power be granted the Board to consider "facts with relation to the taxes for other taxable years" unless the results of that investigation may be applied by the Board in determining the amount of the deficiency that should be paid for the year under investigation? The Board did not have to determine the amount of the taxes for 1935, it only needed to consider the effect of the change in the inventory which normally should have been the same for each year. Its investigation disclosed the fact that the corrected inventory should not in justice be resorted to in redetermining the tax for either of the years 1935 or 1936. Under the circumstances disclosed the Board should prevent respondent from taking advantage of a correction in a bookkeeping entry as the basis for a tax where none was due. As said by Judge Woodrough, speaking for this court in Ruben v. Commissioner, 97 F. 2d. 926, "taxation remains a practical matter."

In Helvering v. Gordon, 87 F. 2d, 665, we said "substance and not form should control in the application of tax laws." A claim for taxes is in the nature of a claim for money had and

received, and can be maintained only where the party against whom the claim is asserted has money, which in equity and good conscience belongs to the other party. Here the Government is confessedly, wrongfully, and as the Supreme Court has said "immorally," holding funds belonging to the taxpayer. There was in fact nothing due the Government and if, under such circumstances, the Board is powerless to prevent an injustice, then it must disregard substance and be governed by form.

It is inconceivable that the latter part of this statute should be intended to take away from the Board the authority conferred by the earlier provisions. The limitation, we think, should be strictly construed. Ryan v. Carter, 93 U. S. 942; B. & O. S. M. Ry. Co. v. U. S., 242 F. 420. Otherwise the statute repeals itself. It confers broad authority but says such authority shall not be exercised. "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. * * *. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." Hormel v. Helvering, supra.

The limitation deprives the Board of authority to "determine" that the tax of any other year has been overpaid or underpaid. While the Board may examine thoroughly into the taxes for other taxable years, in doing so, it may not enter any judgment or decision for or against either party as to their liabilities or rights as to other tax years. The statute says it may not "determine" underpayment or overpayment for other years. One of the usual meanings of the word "determine" is: to decide; judge; adjudicate on an issue presented; to come to a decision; perform a judicial act. Tracy v. McIntyre, (Cal.) 84 P. 2d [illegible] Glenn v. Mitchell, (Colo.) 207 P. 84; In re Talbot's Will, [illegible] S. 2d, 806. The Board was not required to "determine" [illegible]nt of taxes for 1935; it only needed to consider the [illegible] inventory which normally should have been used for [illegible] years.

Board of Tax Appeals, as well as other administrative [illegible]nals, is of recent origin. It functions in the twilight zone. While it is an administrative agency, Congress has conferred upon it judicial, or at least quasi judicial, authority. Its jurisdiction as affected by rules of procedure was not definitely charted, nor was it clear that it would be bound by judicial precedent. Congress has seen fit to permit it to examine thoroughly into the taxes for other taxable years in order to make a proper redetermination of the taxes due for the year or years at issue, but, out of an abundance of precaution, Congress limited the Board by forbidding it to enter any judgment or decision for or against either party as to their liabilities or rights touching other taxable years. Decisions of the Board may be res

judicata on issues tried. A court need not be limited by express statute as to the issues it may hear. Centuries of judicial precedents, and construction compelled by practical necessity, limit its inquiry to the particular issue tendered by the parties. The limitation in this statute is a precaution to a tribunal not strictly judicial that it must not "determine" any tax liability other than for the years to which issue is tendered so as to result in any decision which binds as to those other years.

In any event this court may apply the correct rule of law to the facts as was done in Bull v. U. S., supra, and Crossett Lumber Co. v. U. S. supra. This court has power to affirm, or if the decision of the Board is not in accordance with law, to modify or reverse the decision with or without remanding the case for a rehearing "as justice may require." This we did in Helvering v. Hormel, 8th Cir., 111 F. 2d 1, and the Supreme Court affirmed. Hormel v. Helvering, 312 U. S. 552. In the Hormel case the Supreme Court said "there may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider the questions of law which were neither pressed nor passed upon by the court or administrative agency below."

In the instant case the doctrine of recoupment was in fact pressed upon the Board. But if we have the right to consider the question if it had not been so presented to or passed upon by the Board, the fact that it was so presented cannot deprive this court of the power to apply it here "as justice may require."

The order appealed from is, therefore, reversed and the cause is remanded to The Tax Court of the United States as successor to the Board of Tax Appeals for further proceedings consistent herewith.

WOODROUGH, Circuit Judge, Dissenting.

It appears in this case that the taxpayer received net income of $93,828.83 for the fiscal year 1936 and that the tax liability to which it became subject under the applicable revenue act was $14,951.83. The return which it made for the year was untrue and the Commissioner was required to and did determine deficiency which properly adjusted the tax to the true income. But the taxpayer appealed from the deficiency determination to the Board of Tax Appeals. It was there established that the income determined by the Commissioner was the true income for 1936 and that the tax was rightly computed, but the taxpayer alleged that it had been overassessed and had overpaid its taxes in former years and it called upon the Board to determine such overpayments and to allow a credit for the amount thereof on the tax for 1936.

The Board is given broad powers to consider such facts with relation to the taxes for other taxable years as may be necessary

to correctly determine the amount of a deficiency brought before it for review, but by the statute which created the Board in 1924 and has governed it ever since the Board is expressly prohibited from determining whether or not a tax for any other tax year has been overpaid or underpaid. The statute says that the Board "in so doing (i. e., in considering facts related to the taxes for other taxable years) shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid." 26 U. S. C. A. 272 (g). Complying with that statute, the Board refused to consider the taxpayer's claim for credit for overpayment in prior years, as it has consistently done in like cases since its creation, on the ground that it had no jurisdiction.

The words of the statute forbidding the Board "to determine whether or not the tax for any other taxable year has been overpaid or underpaid" are so plain and unambiguous that no court has been called upon to construe or discuss them. The Seventh Circuit in stating the limitation upon the Board's powers stated it simply in the above quoted words of the statute (Commissioner v. Forest Glen Creamery Co., 7 Cir., 98 F. 2d 968), and the Supreme Court, with the same provision in mind, merely observed that the Board's jurisdiction is "limited to the determination of the amount of deficiency" and that the Board "is without authority * * * to order a credit." (U. S. ex rel. Girard Trust Co. v. Helvering, 301 U. S. 540, loc. cit. 542).

The statute, the Board's consistent obedience to it for nearly ...enty years, the courts' recognition of it and the acquiescence of ... profession have established an administrative system where ...xpayer may appeal to the Board from a deficiency found in ...ear with assurance that the Board cannot use a former ...nderpayment to defeat him and where both the taxpayer ...overnment know that the tax for the year of the defi... the only tax the Board can adjudicate. The system is ...plete, there being other equally certain means, administrative and judicial, to correct over and under assessments or payments in other years.

But of course all the Revenue Acts include limitation of action provisions.

On the review in this court the taxpayer renews its claim of right to have the Board determine the amounts alleged to have been overpaid in former years and credit them on the 1936 deficiency. The arguments in support seem to me to propose a new system for the Board, but on careful consideration of all that has been said neither the new system nor the arguments have appealed to me. Though it is not so stated by it, the petitioner's claim of injustice is really an attack upon the statute of limitations. The taxpayer's untrue returns in prior years, accepted by

the tax collector, caused it to be overtaxed in those years. It had all the time given it by law to obtain correction. But it took no steps within the time allowed. The same limitation applies to all taxpayers alike. It is a lawful limitation, and if unjust to this or any other taxpayer may be changed by Congress but not by the Board or by this court on review of the Board.

The incorrect items of its returns which caused this taxpayer to be overtaxed in years prior to 1936 were the amounts ascribed to inventory, an element in the returns of thousands of taxpayers which is especially subject to erroneous statement. But where overpayment results from the taxpayer's untrue statement the Board cannot say that the government receives the excess upon any continuing trust to offset or credit it on a lawful tax in some later year. On the contrary, it must leave the overpayment to be recovered from the government under the procedure provided by law and not otherwise. It cannot discriminate.

As I see it, the Commissioner having taken the true inventory figure and having rightly computed the taxpayer's true income and lawful tax in the 1936 deficiency, the Board of Tax Appeals was prohibited from finding an overpayment in former years or giving any credit on that account against the deficiency. I would affirm the Board's denial of jurisdiction.

A true copy.
Attest:
[SEAL] E. E. KOCH.
Clerk, U. S. Circuit Court of Appeals,
Eighth Circuit.

Judgment

United States Circuit Court of Appeals, Eighth Circuit

No. 12372—January Term, 1943

Friday, January 29, 1943

GOOCH MILLING AND ELEVATOR COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition to Review Decision of United States Board of Tax Appeals

This cause came on to be heard on the petition to review a decision of the United States Board of Tax Appeals determining a deficiency in income and excess profit taxes of the petitioner for

the fiscal year ended June 30, 1936; in the respective amounts of $4,731.69 and $1,931.73, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the decision of the said Board of Tax Appeals in this cause be, and the same is hereby, reversed without the taxation of costs in favor of either of the parties in this Court.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to The Tax Court of the United States as Successor to the United States Board of Tax Appeals for further proceedings consistent with the opinion of this Court this day filed herein.

JANUARY 29, 1943.

Clerk's Certificate

United States Circuit Court of Appeals, Eighth Circuit

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the printed transcript of record on which the petition to review the decision of the United States Board of Tax Appeals was heard in said Circuit Court of Appeals, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein Gooch Milling & Elevator Company was Petitioner and the Commissioner of Internal Revenue was Respondent, No. 12372.

I do further certify that on the 16th day of February, A. D. 1943, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to The Tax Court of the United States as successor to the United States Board of Tax Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 18th day of March A. D. 1943.

[SEAL]

E. E. KOCH.
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1943

Supreme Court of the United States

Order allowing certiorari

Filed June 1, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover.] File No. 47473. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 972. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner vs. Gooch Milling & Elevator Company. Petition for a writ of certiorari and exhibit thereto. Filed April 28, 1943. Term No. 972 O. T. 1942.

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U. S. GOVERNMENT PRINTING OFFICE: 1943